IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.806 OF 1999
IN
NOTICE OF MOTION NO. 2023 OF 1997
IN
SUMMARY SUIT NO. 443 OF 1995

Govindbhai Dayal Mange
of Bombay INdian INhabitant,
residing at B-60, Pankaj
Society, L.B.S. Marg,
Ghatkopar, Bombay - 400 086,
in his personal capacity and in
his capacity as the heir and
legal representative of the
deceased Dayal Dosabhai. .... Appellant

Versus

1. Vijaykumar Balkishan Agarwal
of Bombay Indian Inhabitant,
carrying on business in the name
and style of Oriental Finance
Company at Oriental House,
3rd floor, 229/231,
Samuel Street, Bombay-400 003.

2. Mahendrakumar M. Mehta,
of Bombay Indian Inhabitant,
of 3, Garibdas Street,
Vadgadi, Bombay-400 003. .... Respondents

Ms K.C. Nichani for the Appellant.

Shri H.V. Chande for the Respondent No.1.

CORAM: R.M.S. KHANDEPARKAR &
D.G. KARNIK, JJ.

DATED: JUNE 28, 2007

ORAL JUDGMENT (Per D.G.Karnik, J.):

1. This appeal is directed against the judgment and

order dated 22-6-1999 passed by a learned single Judge of this Court dismissing the appellant's Notice of Motion No.2023 of 1997, taken out by for setting aside the ex parte decree dated 20-7-1995.

2. The respondent No.1 (for short, the respondent) filed a suit, bearing Summary Suit No.443 of 1995, against the appellant for recovery of loan of Rs.1,00,000/- together with interest, totally amounting to Rs.1,39,496/-. The respondent's case was that a cheque for Rs.1,00,000/- dated 25-11-1991 issued by the appellant towards repayment was dishonoured. The respondent had thereafter filed a criminal prosecution against the appellant under section 138 of the Negotiable Instrument Act. In the said prosecution, the appellant was convicted and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for three more months. The order further directed that if the amount of the fine was recovered, Rs. 90,000/- which was then the balance amount due on the Negotiable Instrument as Rs.10,000/- had already been paid, be paid to the respondents as compensation. It is not in dispute that the appellant deposited the fine of Rs. 1,00,000/- and the respondent has received a sum of Rs.90,000/- towards the compensation as awarded by the Judicial Magistrate.

3. As a condition for admission of the present appeal, this Court directed the appellant to deposit a sum of Rs.75,000/- and the respondent was allowed to withdraw the said amount also. Thus, the respondent has thus received a sum of Rs.1,65,000/- apart from Rs.10,000/- which was already paid by the appellant directly to them.

4. In order to get ex parte decree to be set aside under Order 37, Rule 4 of the Civil Procedure Code, the appellant is required to prove that he had sufficient cause for remaining absent and is also required to prove that he has a reasonably good defence on merits on the basis of which appellant can be granted leave to defend.

5. As regards the sufficient cause for remaining absent, the appellant has stated in the affidavit in support of the notice of motion that after the service of the writ of summons he approached the respondent who told him that the suit was filed by mistake and assured him that he would contact his Advocate and instruct him to withdraw the suit and that the appellant should forget that such a suit has been filed against him. Even though this was denied, we are satisfied that there could have been such a talk in view of the fact that the respondents had paid to the appellant a sum of

Rs.10,000/- in the past. In our view, therefore, the assurance given by the respondent that he would withdraw the suit and the appellant should forget about the suit, constituted sufficient cause for the appellant to remain absent.

6. As regards the appellant being required to show reasonably good defence in the suit, it is not in dispute that the respondent has already received a sum of Rs. 75,000/- which he has withdrawn from this Court. It is also not in dispute that the appellant has received a sum of Rs. 90,000/- towards compensation in pursuance of the order under section 138 of the Negotiable Instrument Act. Whether the appellant is entitled to the credit of the amount which he has paid in pursuance of the order under section 138 of the Negotiable Instruments Act and whether the Respondent is required to account for the amount received by him as compensation is a question which requires consideration. Appellant, therefore, has reasonable defence to the claim of the Respondents. The appellant, therefore, will be entitled to a leave to defend. In our view, the appellant has made out a case that he has a reasonable defence to the suit. In the circumstances, we are of the view that motion should have been allowed and the ex parte decree should have been set aside with permission to the appellant to defend the suit.

7. For the reasons mentioned above the appeal is allowed. The impugned order is set aside and the suit is restored to file. The appellant is granted unconditional leave to defend. The appellant shall file the written statement within a period of eight weeks.

(D.G.Karnik, J.) (R.M.S.Khandeparkar, J.)

lp/app.806.99